

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY E. LEWIS,  
Petitioner,

No. C 12-6221 SI (pr)

**ORDER OF DISMISSAL**

v.

M. SPEARMAN, Warden,  
Respondent.

**INTRODUCTION**

Anthony E. Lewis filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge the sentence imposed following his 2004 conviction. Respondent has moved to dismiss the petition on the ground of untimeliness, and Lewis has filed an opposition. For the reasons discussed below, the action will be dismissed as time-barred.

**BACKGROUND**

Lewis pled guilty and was convicted in Santa Clara County Superior Court of six counts of second degree robbery, sixteen counts of second degree burglary, and seven counts of grand theft. He also admitted that he had suffered a prior serious felony conviction that qualified as a strike under California's Three Strikes Law, and that he had served three prior prison terms. The trial court struck the prior conviction and the three prior prison terms. On November 19, 2004, the trial court sentenced Lewis to a total of twenty-one years and eight months in prison.

1 Lewis appealed. The California Court of Appeal affirmed his conviction on January 23,  
2 2006. The California Supreme Court denied his petition for review on April 12, 2006.

3 On March 27, 2007, Lewis filed a petition for writ of mandate and/or prohibition in the  
4 California Court of Appeal. That petition was denied on May 17, 2007.

5 On November 15, 2007, Lewis filed a habeas petition in the Santa Clara County Superior  
6 Court. That petition was denied on December 31, 2007.

7 On January 28, 2008, Lewis filed a habeas petition in the California Court of Appeal.  
8 That petition was denied on February 15, 2008.

9 On May 28, 2008, Lewis filed a habeas petition in the California Supreme Court. That  
10 petition was denied on December 10, 2008.

11 On February 16, 2012, Lewis filed another habeas petition in the California Court of  
12 Appeal. That petition was denied on March 9, 2012.

13 On April 5, 2012, Lewis filed a habeas petition in the California Supreme Court. That  
14 petition was denied on July 11, 2012, with citations to *In re Robbins*, 18 Cal. 4th 770, 780  
15 (1998), and *In re Clark*, 5 Cal. 4th 750, 767-89 (1993).

16 Lewis then filed a federal habeas petition with a proof of service stating that it was mailed  
17 on November 6 of an unstated year. The petition was stamped “filed” at the courthouse on  
18 December 7, 2012. For purposes of the present motion, the court assumes the petition was  
19 mailed on November 6, 2012, despite the absence of a year on the proof of service. Due to  
20 Lewis’ status as a prisoner proceeding *pro se*, he receives the benefit of the prisoner mailbox  
21 rule, which deems most documents filed when they are given to prison officials to mail to the  
22 court rather than the day the document reaches the courthouse. *See Stillman v. Lamarque*, 319  
23 F.3d 1199, 1201 (9th Cir. 2003). His federal petition is deemed filed as of November 6, 2012.

24 Respondent now moves to dismiss the petition as time-barred.

## 25 26 DISCUSSION

27 Petitions filed by prisoners challenging non-capital state convictions or sentences must  
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1 be filed within one year of the latest of the date on which: (1) the judgment became final after  
 2 the conclusion of direct review or the time has passed for seeking direct review; (2) an  
 3 impediment to filing an application created by unconstitutional state action was removed, if such  
 4 action prevented petitioner from filing; (3) the constitutional right asserted was recognized by  
 5 the Supreme Court, if the right was newly recognized by the Supreme Court and made  
 6 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been  
 7 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

8 Here, the judgment became final and the limitations period started on July 11, 2006,  
 9 ninety days after the California Supreme Court denied the petition for review on April 12, 2006.  
 10 *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999) (direct review period includes the period  
 11 during which the petitioner could have sought further direct review, regardless of whether he did  
 12 so).<sup>1</sup> The presumptive deadline for Lewis to file his federal petition was July 11, 2007.

13 The one-year limitations period is tolled for the "time during which a properly filed  
 14 application for State post-conviction or other collateral review with respect to the pertinent  
 15 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A state habeas petition is considered  
 16 pending not only for the time the case is open on the docket of some court, but also for the time  
 17 period between state habeas petitions if the petitioner files the later state habeas petition at a  
 18 higher level court and does so "within what California would consider a 'reasonable time.'" *Evans v. Chavis*, 546 U.S. 189, 197-98 (2006); *Carey v. Saffold*, 536 U.S. 214, 219-20 (2002).

19 By the time Lewis filed his first state petition for collateral review on March 27, 2007,  
 20 259 days of the limitations period had passed. The limitations period was tolled during the  
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 23 <sup>1</sup>Lewis urges that "the magnitude of petitioner's sentencing errors was not discovered  
 24 until now" because unpublished California appellate court opinions "suffer[] from a lack of  
 25 quality and oversight." Docket # 8 at 6. A delayed start of the limitations period is allowed until  
 26 the time "the factual predicate of the claim or claims presented could have been discovered  
 27 through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Under this provision, the  
 28 limitations period begins "when the prisoner knows (or through diligence could discover) the  
 important facts, not when the prisoner recognizes their legal significance." *Hasan v. Galaza*,  
 254 F.3d 1150, 1154 n.3 (9th Cir. 2000) (citation omitted). Lewis has known the important facts  
 for his claim since his sentencing in 2004, i.e., he has known since then that he was sentenced  
 to consecutive terms that totaled 21 years and 8 months in prison. He is not entitled to a delayed  
 start of the limitations period under § 2244(d)(1)(D).

1 pendency of that petition. After the first petition for collateral review was denied on May 17,  
2 2007, another 182 days passed before Lewis filed his second petition for collateral review on  
3 November 15, 2007. Lewis does not receive tolling for the gap between the denial of the first  
4 petition and the filing of the second petition because the second petition was not filed in a higher  
5 level court and was not filed within what California would consider a reasonable time. *See*,  
6 *e.g.*, *Evans*, 546 U.S. at 197 (noting that six months is far longer than the 30 to 60 days that most  
7 states provide for filing an appeal, the Court held that an unjustified or unexplained 6-month  
8 delay between post-conviction applications in California is not “reasonable” and does not fall  
9 within *Carey*’s definition of the term “pending”); *Velasquez v. Kirkland*, 639 F.3d 964, 968 (9th  
10 Cir. 2011) (finding 91-day and 81-day delays between state habeas petitions were  
11 “unreasonable” with no indications from the California courts to the contrary); *Banjo v. Ayers*,  
12 614 F.3d 964, 970 (9th Cir. 2010) (delay of 146 days between successive petitions not  
13 reasonable, so later petition not “timely filed”); *Chaffer v. Prosper*, 592 F.3d 1046, 1048 (9th  
14 Cir. 2010) (no tolling for 101-day and 115-day gaps between state habeas petitions where those  
15 petitions offered no justification for the delays as required under California law). The one-year  
16 limitations period expired on August 31, 2007, before that second petition was filed. The second  
17 petition and all later state petitions for collateral review have no tolling effect because petitions  
18 filed after the statute of limitations period has ended cannot toll the limitation period. *See*  
19 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2244(d) does not permit  
20 the reinitiation of the limitations period that has ended before the state petition was filed,” even  
21 if the state petition was timely filed).

22 The § 2244(d) limitations period can be equitably tolled for a petitioner who shows that  
23 he pursued his rights with reasonable diligence and that some extraordinary circumstance stood  
24 in his way and prevented timely filing. *See Holland v. Florida*, 560 U.S. 631, —, 130 S. Ct.  
25 2549, 2562 (2010). Lewis does not show any basis for equitable tolling of the limitations period.

26 Lewis contends that a petitioner need not justify a delay in filing a habeas petition when  
27 the petitioner is challenging an excessive sentence or there is a “fundamental miscarriage of  
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1 justice.” See Docket # 8 at 1.

2 A federal court may hear the merits of a successive, abusive, procedurally defaulted, or  
3 untimely claims if the failure to hear the claims would constitute a miscarriage of justice. The  
4 Supreme Court limits the "miscarriage of justice" exception to habeas petitioners who can show  
5 that "a constitutional violation has probably resulted in the conviction of one who is actually  
6 innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Murray v. Carrier*, 477 U.S. at 496).  
7 Under this exception, a petitioner may establish a procedural "gateway" permitting review of  
8 defaulted claims if he demonstrates "actual innocence." *Schlup*, 513 U.S. at 316 & n.32. The  
9 actual innocence gateway established in *Schlup* is available to a petitioner whose petition is  
10 otherwise barred by AEDPA's limitations period. See *McQuiggin v. Perkins*, 133 S. Ct. 1924,  
11 1928 (2013). "[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot  
12 have confidence in the outcome of the trial unless the court is also satisfied that the trial was free  
13 of non-harmless constitutional error, the petitioner should be allowed to pass through the  
14 gateway and argue the merits of his underlying claim." *Schlup*, 513 U.S. at 316. The required  
15 evidence must create a colorable claim of actual innocence, that the petitioner is innocent of the  
16 charge for which he is incarcerated, as opposed to legal innocence as a result of legal error. *Id.*  
17 at 321.<sup>2</sup>

18 Assuming arguendo that the actual innocence gateway is available to a petitioner whose  
19 conviction rests on a guilty plea, Lewis cannot pass through the gateway because he makes no  
20 effort to show actual innocence. His argument appears to be that there was a "miscarriage of  
21 justice" because his sentence was, in his view, "absurd." Docket # 8 at 1. Perceived absurdity  
22 does not amount to a miscarriage of justice and does not excuse the untimely petition. Further,  
23 Lewis' assertion that he was consecutively sentenced under a provision that applies only to sex  
24 offenders misses the mark because he has mixed up two statutes: California Penal Code § 667.6  
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26 <sup>2</sup>The *Schlup* test does not work well with a petitioner who has pled guilty or no contest  
27 rather than gone to trial. This court will assume arguendo that the actual innocence gateway  
28 would be available to a petitioner who has pled no contest, but that is an open question.  
See *Smith v. Baldwin*, 510 F.3d 1127, 1140 n.9 (9th Cir. 2007) (en banc).

1 concerns prior sex offenses and California § 667 concerns regular habitual offenders. Although  
2 Lewis posits otherwise, § 667(c)(6) is not a subdivision of § 667.6. Lewis does not show a  
3 miscarriage of justice that allows him to avoid the statute of limitations.

4 Lewis' federal petition was deemed filed on November 6, 2012, more than five years after  
5 the limitations period had expired. The petition must be dismissed because it was not filed  
6 before the expiration of the habeas statute of limitations period.

7 A certificate of appealability will not issue because this is not a case in which "jurists of  
8 reason would find it debatable whether the petition states a valid claim of the denial of a  
9 constitutional right and that jurists of reason would find it debatable whether the district court  
10 was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).


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12 **CONCLUSION**

13 Respondent's motion to dismiss is GRANTED. (Docket # 7.) The petition for writ of  
14 habeas corpus is dismissed because it was not filed before the expiration of the limitations  
15 period in 28 U.S.C. § 2244(d)(1).

16 The clerk will close the file.

17 IT IS SO ORDERED.

18 DATED: October 7, 2013

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21 SUSAN ILLSTON  
22 United States District Judge  
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